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Tips for Drafting Contracts

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Some contracts must be in writing to be enforceable. Others are enforceable without a writing.¹ Even those contracts that do not need to be in writing often are written.² This article briefly discusses the art of drafting a written contract.³

Drafting contracts involves skills that can be developed and honed. The ability to write well is the most valuable tool a paralegal can acquire. The following material provides some suggestions for drafting a well-written contract. These suggestions also apply to drafting well-written memoranda and briefs. Reflect upon your own writing. Can some of these tips improve your writing?

A. Draft from an Outline

Before drafting, develop an outline for the contract. An outline helps the drafter present the terms of the contract in a logical, orderly fashion. An outline prevents the omission or duplication of essential terms.

Begin the outlining process by defining the purpose of the contract. Next, following the organizational structure of the law of contracts, develop a checklist of items that the contract might or should address.

* Professor of Law, The University of Tulsa. This article first appeared as a chapter in "Introduction to Contracts and Restitution for Paralegals," by Martin A. Frey and Terry H. Bitting, West Publishing Co. (1988). Adapted by permission from *CONTRACTS AND RESTITUTION FOR PARALEGALS* BY MARTIN A. FREY AND TERRY H. BITTING. COPYRIGHT © 1988 by West Publishing Company. All rights reserved.

1. The formation of a contract and the enforcement of the contract are separate questions. A writing is not required for contract formation (unless the offeror requires a writing as the last act of contracting). A writing, however, may be required for the enforcement of the contract. Whether a court will not enforce a contract because it is not in writing is controlled by the Statute of Frauds. The three most common examples are: a contract for the sale of goods for the price of \$500 or more must be in writing to be enforceable; a contract that could not be fully performed within one year from the date of contract formation must be in writing to be enforceable; and a contract for the sale of an interest in real estate must be in writing to be enforceable. Even in those situations where a writing is required by the Statute of Frauds, the question then becomes what terms must be in the writing.

2. If a contract has been committed to writing, whether the writing was required or not, the question must then be whether the writing includes all the contract terms or only some of the contract terms. This question involves the parol evidence rule.

3. This article does not discuss the Statute of Frauds or the parol evidence rule. The focus of this article is the writing, whether required or not and whether inclusive of all the contract terms or not.

The following is the beginning of a checklist:

1. Scope

The applicable state law if the parties decide to select the applicable state law (that is, choice-of-laws provision)
2. Contract formation
 - a. The offeror's duties
 - b. The offeree's duties
 - c. The timing and dependence of the performance of the duties on one another
 - d. Events or conditions necessary to create the duty
 - e. Events or conditions necessary to terminate the duty
 - f. Whether all the terms of this contract will be set forth in this writing and, if so, whether the writing should so state (that is, a merger clause)
3. Enforcement
 - a. If the contract must be in writing to be enforceable, what terms should the writing contain and who must sign
 - b. If the contract could be held unenforceable, what should be the alternative course of action of the parties
4. Breach
 - a. Definition of breach
 - b. Significance of breach
5. Remedies for the Aggrieved Party
 - a. The aggrieved party's remedies
 - b. Alternative methods of dispute resolution in lieu of litigation (for example, mediation or arbitration)
 - c. A statement relating to costs and attorneys' fees
 - d. The forum in which litigation would take place

B. Be Brief

Omit surplus words. State your meaning clearly and concisely. More words do not make a better contract. Wordiness only creates an opportunity for ambiguity and confusion. Eliminate unnecessary paragraphs, sentences, phrases, and words. Good writing stresses conciseness.

A single word can often substitute for a verbose phrase:

afford an opportunity	allow, let
and/or	or
as to whether	whether
at that point in time	then
due to the fact that	because
during the period when	when
during the time that	during, while
file an action against	sue
first of all	first
force and effect	force, effect
for the reason that	because
free and clear	free, clear
full and complete	full, complete
from the point of view	from
good consideration	consideration
have an impact on	affect
have a tendency to	tend
insofar as . . . is concerned	(omit the entire phrase and start with the subject)
null, void, and of no further effect	void
point in time	time
prior to	before
subsequent to	after
suffer and permit	permit
sufficient consideration	consideration
there is no doubt but that	doubtless, no doubt
the question as to whether	whether, the question whether
this is a topic that	this topic
void contract	no contract
written document	document
written instrument	instrument

Many verbose phrases are compound prepositions:

by means of	by
by reason of	because of
by virtue of	by, under
for the period of	for
for the purpose of	to
in accordance with	by, under
inasmuch as	since
in connection with	with, about, concerning
in favor of	for
instances in which	when
in lieu thereof	instead
in order to	to
in regard to	about
in relation to	about, concerning
in spite of the fact that	although
in terms of	in
in the nature of	like
in view of	because
on the basis of	by, from
on the part of	by
until such time as	until
with the exception of	except
with reference to	about, concerning
with regard to	about, concerning
with respect to	on, about

As an exercise, remove the unnecessary verbiage from the following paragraph.

1. The lessor, party of the first part, agrees
2. to lease, rent and/or otherwise allow the lessee
3. party of the second part, to use, occupy and
4. hereafter during the term of this lease, make use
5. of lessor's, said party of the first part's premises.

6. The lessee, said party of the second part, shall
7. compensate, pay and/or remit to the lessor, said
8. party of the first part, for and in consideration
9. of the said agreement of lease, rent and/or
10. otherwise use lessor's, said party of the first
11. part's premises, the dollar sum of Two Thousand
12. Dollars (\$2,000.00).

C. Simplify Your Language

Use clear, precise terms. Avoid synonyms. If you mean "rooster," use "rooster." If you mean "hen," use "hen." If you mean "rooster" but use "chicken," a synonym, the reader might believe you mean "hen." Do not confuse your reader by using different words to refer to the same object or idea.

Avoid "legalese." Legalese does not make a writing "legal." Legalese only makes a writing pompous and confusing.

EXAMPLE

Said Jack and said Jill went up the said hill to fetch a said pail of said water.

When removing "said" from your writing, also remove "heretofore," "one," "whereas," and any other legalese that you might find. The following list will form a starting point for words to remove:

aforementioned
aforesaid
forthwith
hereafter
hereby
hereinafter
heretofore
herewith
one
said
thence
whereas

"Minimize confusion by referring to parties by name rather than designating them "the party of the first part" and "the party of the second part."

Avoid indefinite pronouns such as "it, they, this, who and which." An

indefinite pronoun only adds confusion. When possible, substitute a noun for a pronoun.

EXAMPLE

The following sentences can be rewritten to eliminate the indefinite pronouns.

“In this law review article it states that paralegals are real assets.”

“This law review article states that paralegals are real assets.”

“They say that the program for legal assistants is one which benefits students.” “The legal assistants program benefits students.”

“There is a house, it stands on a hill.” “The house stands on a hill.”

Avoid “etc.” “Etc.” gives the reader no new information and only demonstrates that either the writer does not know or is too lazy to tell the reader.

EXAMPLE

“The bride received gifts from New York, Florida, California, etc.”

When rewritten to avoid “etc.”, the sentence becomes “The bride received gifts from many states, including New York, Florida and California.”

Simplify your drafting style. Group similar terms together.

EXAMPLE

“The seller shall deliver the goods to buyer’s store. The buyer shall pay the seller upon delivery. The seller will pay the cost of shipping. The buyer will inspect the goods upon delivery. The goods are sold as is. The buyer shall insure the goods during transit.”

When rewritten to group similar terms together, the paragraph becomes:

“The seller shall:

1. sell the goods “as is;”
2. deliver the goods to the buyer’s store; and
3. pay the cost of shipping.

The buyer shall:

1. pay the seller upon delivery;
 2. inspect the goods upon delivery; and
 3. insure the goods during transit.”
-

Could the following lease be improved by deleting the legalese and grouping the lessor’s duties and lessee’s duties?

1. WITNESSETH: that the party of the first
2. part, for and in consideration of the rents,
3. covenants and agreements hereinafter contained,
4. does, and by these presents, demise, lease and
5. rent, for a period of six months from the first
6. day of June, 1987, to the party of the second
7. part, the following described property, to-wit:
8. The party of the second part, for and in
9. consideration of the use and possession of said
10. premises for said period, does hereby agree to pay
11. unto the party of the first part, the sum of Three
12. Thousand Dollars (\$3,000.00), said sum to be paid
13. in the following amounts and at the time herein
14. designated, to-wit:
15. On the first day of June, 1987, the sum of
16. Five Hundred Dollars (\$500.00), and on the first
17. day of each and every month hereafter the sum of
18. Five Hundred Dollars (\$500.00), until the total
19. sum of Three Thousand Dollars (\$3,000.00) shall
20. have been fully paid.
21. THE PARTY OF THE SECOND PART further agrees to
22. keep and maintain all portions of the building let
23. to him by the terms of this contract in as good
24. state of repair as the same are turned over to him.
25. THE SECOND PARTY further agrees to be
26. responsible and pay for the repair of any damage
27. done to any of the buildings or grounds by any of
28. his family or guests.
29. THE SECOND PARTY agrees to hold said first
30. party free from any and all expenses for lights,
31. heat or any other expense incident to the
32. occupant of said property.
33. THE PARTY OF THE SECOND PART shall not engage,
34. or allow any other person, pet or animal to engage
35. in, any conduct that will disturb the quiet and
36. peaceful enjoyment of the other tenants, the party
37. of the first part, or the neighbors of second
38. party, or use the premises for any purpose
39. whatsoever which violates the laws of the
40. United States, the State of New Hampshire, or the
41. City of Concord.

D. Use Base Verbs and the Active Voice

Activate your writing with verbs. Replace nouns with verbs. The purest verb form is the base verb (for example, collide, decide, pay). Verbs give sentences movement and life. Nouns do not. Use the base verb rather than its derivative noun.

collide	collision
decide	decision
pay	payment
resolve	resolution

Replace forms of the verb “to be” (is, are, be) with active verbs (run, skip, jump).

EXAMPLE

“The ruling was made by the trial judge” becomes “The trial judge ruled.”

Active voice energizes your writing. Substitute active for passive verbs. With active voice, the subject of the sentence acts. With passive voice, the subject of the sentence is acted upon.

EXAMPLE

“The police were called by Tom” becomes “Tom called the police.”

Passive voice usually requires more words than active voice. In the above example, the passive voice requires a supporting verb (were) and a preposition (by).

Passive voice creates detached abstraction within the sentence. With the active voice, the reader readily understands who is doing what to whom. With passive voice, who is doing what to whom is often unclear.

E. Avoid Sexist Language

“Every man for himself” is history. Sexist language should be deleted from your writing. Several tips are useful:

1. Avoid expressions that imply value judgments based on sex.

EXAMPLE

“Are you a man or a mouse?”

“A difficult task is a man’s work.”

“Don’t be such a weak sister.”

“He refused to do woman’s work.”

2. Change the wording of male-oriented expressions to include both men and women.

EXAMPLE

“reasonable man” becomes “reasonable person”
“gentlemen of the jury” becomes “members of the jury”
“Dear Sir” becomes “Dear Madam or Sir”

3. Replace sex-based descriptions and titles with non-sex-based descriptions and titles.

EXAMPLE

“workman” becomes “worker”
“newsman” becomes “journalist”
“fireman” becomes “firefighter”

4. Use parallel construction when referring to both sexes.

EXAMPLE

“man and wife” becomes “husband and wife.”

5. Avoid masculine singular pronouns when not referring to a male. Although “he or she” can be used in moderation, it is often best to rewrite the sentence.

a. Omit the pronoun if it is unnecessary.

EXAMPLE

“The average citizen feels that he is doing his duty by voting” becomes “The average citizen feels a duty to vote.”

EXAMPLE

“Every person has his constitutional rights” becomes “Every person has constitutional rights.”

b. Use the second person rather than the third person.

EXAMPLE

“Each voter must cast his own ballot” becomes “As a voter, you must cast your own ballot.”

c. Use the plural rather than the singular.

EXAMPLE

“Every spring the farmer plows his fields” becomes “Every spring farmers plow their fields.”

EXAMPLE

“The policeman risks his life on a daily basis” becomes “Police officers risk their lives daily.”

F. Check for Spelling, Punctuation, and Grammatical Errors

Common spelling errors should be eliminated from your writing. Do not expect a secretary to correct your work. Errors will reflect upon you and not your secretary. Keep a list of words you tend to misspell.

EXAMPLE

The following are common spelling errors:

accommodate	not accomodate
admissible	not admissable
allege	not alledge
already	not allready
alright	not all right
argument	not arguement
coming	not comming
condition precedent	not condition president
defendant	not defendent
definite	not definat
demurrer	not demurer
discussed	not discused
dissatisfied	not disatisfied
divisible	not divisable
existence	not existance
integrated	not intagrated
judgment	not judgement
occurred	not occurred or occured
separate	not seperate
their	not thier
unconscionable	not unconcionable or unconsonianable or uncontentionable
until	not untill
warranty	not warrenty or warrantee

whether	not wether
writing	not writting
written	not writen

Check punctuation.

Eliminate grammatical errors from your writing. A common error is to write “it’s” for “its” and “its” for it’s.” “It’s” is a contraction, meaning “it is.” “Its” is a possessive pronoun.

EXAMPLE

“It’s February 2 and the groundhog saw its shadow.”

“Irregardless” is improper. Use “regardless.”

EXAMPLE

“I will do as I please irregardless of the consequences” becomes “I will do as I please regardless of the consequences.”

Check “to,” “too,” and “two.”

EXAMPLE

“We dined out from one to two and ate too much.”

Distinguish between “between” and “among.” “Between” is used for only two while “among” implies more than two.

EXAMPLE

“The voters had a choice between Mary and John for President and among Susan, Tony, and Robin for Vice President.”

“Their,” “there,” and “they’re” can cause problems.

EXAMPLE

“With the first crash of thunder, their horses broke away from the wagon and left them there in the wilderness where they’re unlikely to find help.”

“Affect” is always a verb and means to influence. “Effect” is most commonly a noun and means result.

EXAMPLE

“The pickets will affect the company’s production but their actions will have only a short term effect.”

“Whether” should be distinguished from “weather.”

EXAMPLE

“The weather report did not help us decide whether to risk a trip to the beach.”

These suggestions are but a brief introduction to better drafting. A number of helpful books are available. They include: G. Block, *Effective Legal Writing* (Foundation Press 1981); L. Glorfeld, D. Lauerman, & N. Stageberg, *A Concise Guide for Writers* (Holt, Rinehart, Winston 4th ed. 1977); K. E. Gordon, *The Transitive Vampire: A Handbook of the Innocent, the Eager, and the Doomed* (Times Books 1984); D. Mellinkoff, *The Language of the Law* (Little, Brown & Co. 1963); C. Miller & K. Swift, *The Handbook of Nonsexist Writing* (Harper & Row 1980); W. Strunk & E. B. White, *The Elements of Style* (MacMillan 3d ed. 1979); R. Wydick, *Plain English for Lawyers* (Carolina Academic Press 1979).